Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1102

JAMES L. PICKERING,
Petitioner-Appellant,

v.

COUNTY OF ERIE, NEW YORK,
Respondent-Appellee.

MOTION TO DISMISS OR AFFIRM

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1102

JAMES L. PICKERING,

Appellant,

v.

COUNTY OF ERIE, NEW YORK,

Appellee.

On Appeal from the Second Circuit
Court of Appeals

MOTION TO DISMISS APPEAL OR TO AFFIRM

Appellee (hereinafter County of Erie) moves that the appeal herein taken be dismissed (a) pursuant to Rule 16(1)(a) of the Revised Rules of

the Supreme Court of the United States on the ground that said appeal is not within the jurisdiction of this Court because it is not taken in conformity to statute or to the United States Supreme Court rules or, (b) to affirm the judgment sought to be reviewed on the appeal, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, on the ground that it is manifest that the questions on which the decision of this action depends are so insubstantial as not to need further argument.

ARGUMENT

This appeal is from a judgment of the Second Circuit, Court of Appeals, that affirmed the judgment of the United States District Court for the Western District of New York which dismissed Appellant James L. Pickering's

(hereinafter Pickering) complaint and amended complaint ("complaint ammendae") for failure to state a cause of action under 42 USC §1985 (subd. 3), commonly known as the United States Civil Rights Act and also because it failed to show monetary jurisdiction.

Pickering's jurisdictional statement alleges that since he demanded a trial by jury, the District Court lacked the authority to grant the County's motion to dismiss and, further, that the District Court's misfiling of his amended complaint indicates that the Court did not even look at the alleged documentary evidence in his amended complaint before granting the motion. Pickering also repeats various allegations in the statement which were made in his complaint and amended complaint and which have already been considered by two courts.

Since the facts of this case are important and, Pickering's statement is not adequately to apprise the Court thereof, the following matters of record which were set forth in briefs to the District Court and to the Circuit Court of Appeals are repeated for the Court's convenience.

Pickering was directed by an order of the Family Court of Erie County to make support payments of $100 a week to his wife and seven minor children. Later, when circumstances changed, the order was modified by Family Court to $70 a week. Pickering appealed this order to the Appellate Division, Fourth Department, of the New York State Supreme Court, claiming that Family Court had no authority to issue the order and that his wife had forfeited her right to support because she had abandoned him and the children. The Appellate Divi-

sion affirmed the Family Court order (Pickering v. Pickering, 58 AD2d 1039, 397 NYS2d 508 [1977]). Pickering has made no effort to seek further appeal of this decision in the New York courts.

During this same time an issue arose concerning Pickering's request to review an official file kept by the Erie County Department of Social Services pertaining to his daughter Michele. He was denied access to the file because New York State law mandates that the file be confidential. (N.Y. Social Services Law §372 [McKinney's 1976.]) Pickering was advised that he could seek judicial review of this decision, but made no effort to do so. He then commenced an action in Federal Court based on alleged violation of his rights under 42 USC §1981 et seq. The County made a motion to dismiss for failure to state a cause of action which was granted

on October 17, 1978 with leave to Pickering to amend the complaint within 60 days. Pickering timely served an amended complaint entitled "complaint ammendae" which was apparently misplaced or misfiled by the District Court, for on January 11, 1979, it issued an order finally dismissing Pickering's cause of action for failure to amend within 60 days.

On January 12, 1979, however, the Court sent a letter to the parties in which it stated the "complaint ammendae" would be considered as a motion to vacate the judgment of January 11, 1979.

On February 9, 1979, Pickering argued his case in District Court before John T. Curtin, who asked Pickering to add anything of substance he had to the allegations contained in his complaint and "complaint ammendae". After hearing Pickering's oral argument, the Court

vacated its January 11, 1979 order and then granted the County of Erie's motion to dismiss with prejudice. On May 18, 1979 there was a meeting before Judge Curtin to settle the order, at which time the County explained in detail the proposed order and judgment to Pickering, who agreed in open court to their form. Pickering appealed this order and judgment to the United States Court of Appeals for the Second Circuit, which affirmed on November 13, 1979.

POINT I

THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT BECAUSE IT IS NOT TAKEN IN CONFORMITY TO STATUTE OR TO THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Pickering seeks review by an appeal of right under this Court's appellate jurisdiction, of the Circuit Court of Appeals judgment affirming the dismissal of his complaint and amended complaint. The exercise of the Supreme

Court's appellate jurisdiction is specifically restricted by the United States Constitution to those situations specified by Congress (U.S. Const., Art. III, §2 ¶2). Congress has enacted laws governing this appellate jurisdiction (28 USC §§1252-1258). Neither under 28 USC §§1252-1258 nor under the Civil Rights Act, (42 USC §1981 et seq.) is there any provision that allows Pickering to bring an appeal of right. This is not an appeal under 28 USC §§1253, 1254 or 1257. Furthermore, the Civil Rights Act states that review by Court of a violation under that Act shall be the same as is provided by law for the review of other causes in the Supreme Court (42 USC §1984). Pickering's appeal, therefore, should be dismissed as improvidently granted because there is no appellate jurisdiction of right.

Pickering has failed also to conform his appeal to the Revised Rules of the Supreme Court of the United States in that: (a) he failed to include in his petition the proof of service required by Rule 13(2) and Rule 33(3) and (b) he failed to include in his petition the opinion of Hon. John T. Curtin which was issued with the October 17, 1978 order dismissing the complaint with leave to amend, and the opinion of the Appellate Division of New York State Supreme Court (Pickering v. Pickering, 58 AD2d 1039, case 100). Such opinions are necessary to ascertain the basis of the judgment from the Court of Appeals, and are therefore required by Rule 15(1)(h).

Since Pickering may not appeal of right to this Court and since he has failed to conform his statement/petition to the Rules of the Supreme Court, his appeal must be dismissed.

POINT II

THE SUPREME COURT SHOULD AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED ON THE APPEAL ON THE GROUND THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THIS ACTION DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Pickering's right to a jury trial, which in an action under 42 USC §1985 is guaranteed by the Seventh Amendment was not violated by granting the County's motion to dismiss. Whether a complaint states a cause of action upon which relief can be granted is a question of law for the court. (See Baltimore and Carolina Line, Inc. v. Redman, 295 U.S. 654, 657; Allen v. Biggs, 62 F. Supp. 229) Here Pickering's complaint and amended complaint failed to meet the legal challenge of the common law demurrer: If every fact alleged by the pleader be taken as established, the pleader is still entitled to no relief against the

opposite party. (Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Fla., 434 F.2d 871)

Picerking's allusions to the treatment received from the District Court, implying that his treatment was less than fair, especially since he was appearing pro se, is directly refuted by the facts.

The Court issued an opinion with its first order dated October 17, 1978 dismissing the complaint for failure to state a cause of action which clearly stated the deficiency of Pickering's complaint and gave him 60 days in which to remedy it. While the Court did misfile his "complaint ammendae", no harm resulted because it notified the parties one day after the January 11, 1979 order was issued that a motion to vacate that order, based on the amended complaint would be heard on February 9,

1979. Pickering, on February 9, 1979, in a much more articulate manner than would appear from his complaint and amended complaint, orally argued his case before the District Court. It was only after hearing this argument, that the Court found there was no cause of action. In any event, the sufficiency of his pleadings was reviewed on appeal.

Pickering's pro se status is one of choice and not circumstance in that he does not lack nor claim to lack the financial means to hire counsel. Deference must be given to pro se complaints for they may not have the legal technicalities found in a pleading prepared by counsel. However, where not only the complaint and amended complaint, but even oral argument by a pro se plaintiff failed to set forth facts which would entitle one to relief, then even a

pro se complaint must fail. (Haines v. Kernee, 404 U.S. 519, 520, Cruz v. Beto, 405 U.S. 319, 322)

Pickering's complaints alleged in conclusory terms the existence of a "constructive conspiracy" but he stated no facts to support this either in his pleadings or on oral argument.

Therefore, the District Court dismissed citing Powell v. Jarvis (460 F. 2d 551).

Pickering orally, and in writing made mention of an injudicious remark made by the Family Court Judge pertaining to him which is presented in the Family Court transcript, as evidence of the "conspiracy". Obviously, if "conspiracy" existed this injudicious remark would have been a certain candidate for editing out of the official transcript.

Furthermore, Pickering failed to allege that any conduct of County personnel involved was in furtherance of

official County policy. According to Monnell v. Department of Social Services of the City of New York (436 U.S. 658), a municipality, cannot be held liable under 42 USC §1981 et seq. on a theory of respondent superior. Based on the above-mentioned reasons the District Court properly dismissed Pickering's complaint and amended complaint for failure to state a cause of action upon which relief can be granted.

POINT III

IF THE CLAIM BE CONSIDERED IN TORT, IT FAILS TO MEET THE MONETARY THRESHOLD.

Since the County is not liable under 42 USC §1981 et seq., then $10,000 is required for subject-matter jurisdiction under 28 USC §1330. An allegation of unliquidated damages must be carefully examined to ensure the jurisdictional amount is made in good faith. (See, Saint Paul Mercury Indemnity Co. v.

Red Cab Co., 303 U.S. 283, 288-289) Pickering stated no factual basis for the $5,000,000 for mental anguish damages so these must be viewed as a claim not made in good faith. Pickering also alleged in his pleadings that loss wages result from the Family Court order. However, the Family Court order merely guarantees he expend part of his income in a proper manner, i.e. to provide food for his family.

Therefore, Pickering does not meet the $10,000 requirement of 28 USC §1331 and the Court properly dismissed his pleadings for lack of subject-matter jurisdiction.

Upon reading both the complaint and amended complaint it becomes obvious that Pickering was, and still is, very angry about the Family Court order that requires him to support his family and that this action based on 42 USC §1985 (subd. 3) was brought to have that order

collaterally reviewed by the Federal Court system. The Court of Appeals for the Second Circuit has held such review is impermissible [Mitchell v. National Broadcasting Co., 533 F.2d 265 (2d Cir.)]. There is no valid ground for an appeal.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT PROVIDED FOR BY STATUTE AND BECAUSE IT DOES NOT CONFORM TO THE REVISED RULES OF THE SUPREME COURT.

OR

IF DEEMED A PETITION FOR CERTIORARI, IT SHOULD BE DENIED OR, IF GRANTED, THE JUDGMENT SHOULD BE AFFIRMED ON THE GROUNDS THAT THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Respectfully submitted,

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of the Brief.

APPENDIX "A"
Decision of the New York State Supreme Court,
Appellate Division, Fourth Department.

5 E A.D. 2d

provided in explicit terms that West Lake was to be reimbursed to the extent of any mortgage tax credit accorded the purchaser. Although there is no true ambiguity in the quoted clauses, any ambiguity therein should be resolved against West Lake, the draftsman of the doubtful provisions. (*Hodom v Stearns*, 32 AD2d 234.) (Appeal from judgment of Monroe Supreme Court—submitted controversy.) Present—Simons, J. P., Dillon, Hancock, Denman and Goldman, JJ.

100 JAMES L. PICKERING, Appellant, v RITA PICKERING, Respondent.—Order unanimously affirmed, without costs. Memorandum: Petitioner appeals from an order denying his motion to terminate an order directing him to support his wife and five children. He alleges that the order is invalid because the parties are living together and, conversely, that it is invalid because his wife has abandoned him. A man has a continuing obligation to support his wife and children according to his means (Family Ct Act, §§ 412, 413) and in the absence of a pending matrimonial action, Family Court has exclusive jurisdiction of proceedings to compel support payments (Family Ct Act, § 411). The court may grant a support order when the parties are living together or apart, unless the wife has forfeited her right to support by abandoning her husband (see *Levy v Levy*, 22 AD2d 794). Petitioner asserted at oral argument that his wife had abandoned him and the children, but there is no evidence in the record that she has, and Family Court properly denied the motion to terminate support payments. We have considered the other points raised by petitioner and find them without merit. (Appeal from order of Erie County Family Court—support.) Present—Simons, J. P., Dillon, Hancock and Goldman, JJ.

101 LARRY S. INGALLS, as Father of WADE F. INGALLS, an Infant, Respondent, v JOAN A. INGALLS, Appellant.—Order unanimously affirmed, without costs. Memorandum: Petitioner and respondent were married in 1969 and their son, Wade, was born on January 28, 1971. In May, 1973 respondent, with Wade, left the marital residence. Thereafter petitioner brought a habeas corpus proceeding in Jefferson County Family Court seeking custody of Wade, and a hearing was held thereon in the spring of 1974. The court did not award custody to either parent to the exclusion of the other but directed that the child should live with his mother and granted broad visitation privileges, including weekends and the summer months, to the petitioner. At the time of that hearing respondent was pregnant and it was admitted that one Terry Shelly, who was a frequent visitor to respondent's residence, was responsible for the pregnancy. Immediately subsequent to the court's earlier award, respondent took up permanent residence with Terry Shelly and soon thereafter a child, Darin, was born to them. In this proceeding, instituted in January, 1975, petitioner sought custody of Wade based upon changed circumstances. Respondent appeals from Family Court's award of custody to petitioner, contending, *inter alia*, that the court abused its discretion in basing its award upon

APPENDEX "B"
OPINION OF DISTRICT COURT ISSUED
OCTOBER 17, 1978.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JAMES L. PICKERING
Hand Road
Chaffee, New York 14030,

Plaintiff,

-vs- Civ-78-203

COUNTY OF ERIE, N.Y.
95 Franklin Street
Buffalo, New York 14203,

Defendant.

Plaintiff has filed a pro se complaint alleging that the County of Erie has conspired to violate his rights under the Sixth and Ninth Amendments and the Contract Clause of the United States Constitution. The "specific acts" which plaintiff refers to in his complaint consist for the most part of conclusory allegations that Family Court and Department of Social Services personnel "maintain a system" which interferes with his rights. The only allegations which have any specificity are allegations that a certain social worker gave false testimony in Family Court and that Family Court personnel "obstruct justice" by maintaining a system of hand signals whereby "pertinent testimony is eliminated from the official record." However, plaintiff fails to indicate how he has been personally injured by these occurrences.

The complaint is dismissed upon motion of the defendant for failure to allege facts sufficient to support his claims. Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972). Plaintiff will be allowed 60 days to amend his complaint to remedy the above-mentioned inadequacies.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: October 17, 1978